

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 27261-3-III
)	
Respondent,)	
)	
v.)	Division Three
)	
DOROTHY LOU WESSELS,)	
)	
Appellant.)	UNPUBLISHED OPINION

Korsmo, J. — Ms. Dorothy Lou Wessels challenges the evidence supporting her three convictions for delivery of a controlled substance and two convictions for involving a minor in a drug transaction. She also argues that she was entrapped into making two of the drug deliveries. We agree that the evidence does not support one of the counts of involving a minor in a drug transaction, but we affirm the other convictions and remand for a new sentencing proceeding.

FACTS

Ms. Wessels was charged with the six counts in Garfield County Superior Court.

She waived her right to a jury trial and proceeded to bench trial.

James Moloney worked for the South Eastern Narcotics Team as a paid informant. He was assigned to infiltrate and investigate drug activities in the Pomeroy area. He worked at the Sage Brush Tavern in Pomeroy. There he met Ms. Wessels, a tavern patron. The two struck up an intimate romantic relationship. Eventually, Moloney set up three marijuana purchases through Ms. Wessels.

The three purchases were “controlled buy” situations in which Moloney was searched by law enforcement for money and contraband before the purchase, observed by an officer up to the time of the purchase, and then searched again afterwards. Clerk’s Papers (CP) 32 (Finding of Fact 3). The first purchase occurred October 25, 2007. On that occasion, Moloney drove to Ms. Wessels’ house and gave her \$100. He then returned to the tavern and awaited her. Ms. Wessels then drove up with her 17-year-old daughter Tasha seated in the front passenger seat. Moloney testified that Wessels then handed the marijuana to Tasha who handed it to him. Ms. Wessels and her daughter testified that Wessels handed the marijuana directly to Moloney.

The next purchase occurred November 7, 2007. Moloney again went to Ms. Wessels’ residence and gave her money for marijuana. Tasha and two men who were also present discussed adding some money to the purchase in order to get a “pinch” for

themselves. They ultimately left the house before Ms. Wessels went and obtained the marijuana from her supplier. Moloney returned to the house and received the marijuana directly from Ms. Wessels. Tasha Wessels was not present when Moloney received the marijuana.

On November 20, 2007, Moloney was present at Ms. Wessels' house and directly handed money to her supplier. The supplier left and obtained the marijuana, then returned to the house and handed the marijuana to Moloney. Tasha Wessels was present in the house.

Ms. Wessels testified that she had been both entrapped and coerced into the first two drug deliveries by threats from Moloney. The trial court found there was no credible evidence that Ms. Wessels acted under duress. The court also found that Ms. Wessels did not establish her entrapment defense by a preponderance of the evidence. CP 35. The court then found her guilty of all three deliveries and of involving a minor in a drug transaction on the first two occasions. The court acquitted Ms. Wessels of involving a minor in the November 20 delivery.

The court imposed a mitigated sentence below the standard range sentence based on the fact that the informant and the defendant had developed an intimate relationship before the crimes were committed. CP 36. Ms. Wessels then appealed to this court.

ANALYSIS

Sufficiency of the Evidence. Ms. Wessels challenges both convictions for involving a minor, contending that the evidence does not support the verdicts. We agree with respect to the second count.

The law in this area is well settled. Evidence is sufficient to support a verdict if the jury has a factual basis for finding each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The evidence is viewed in the light most favorable to the prosecution. *Green*, 94 Wn.2d at 221.

Subsequent to the trial in this case, our Supreme Court clarified the nature of the evidence needed to support a charge of involving a minor in a drug transaction in *State v. Flores*, 164 Wn.2d 1, 186 P.3d 1038 (2008). In that case, the defendant had been convicted of involving a minor because his daughter was present in the room on two occasions when he had sold drugs. *Id.* at 6-7. Canvassing federal authorities, our court declared that more than mere presence of a minor was necessary in order to support a conviction. Instead, there must be some affirmative evidence that the child played a role in the offense at the defendant's direction. *Id.* at 16-18, 22.

Similar to *Flores*, there is no evidence that Tasha Wessels was anything more than present on November 7 when Mr. Moloney gave Ms. Wessels money to purchase marijuana. She had no role in that offense and was admittedly not present when the marijuana was actually delivered. While Tasha Wessels discussed putting in money to obtain a “pinch” of the marijuana, that evidence did not itself further the delivery from her mother to Mr. Moloney. Also noticeably missing is any evidence that Ms. Wessels somehow brought about involvement by Tasha. The evidence produced at trial simply does not support a finding that Tasha was involved in the crime.

There was evidence, however, to support the conviction on the October 25 count. Unlike both the November 7 incident and the facts of *Flores*, Tasha was not simply a passive observer in a room where a drug transaction took place. Instead, she was driven to the scene by her mother and then used as a conduit to hand the marijuana to Mr. Moloney. This evidence does support the finding that Tasha Wessels was involved by her mother in a drug transaction.

We affirm the conviction in count II and reverse the conviction in count IV.

Entrapment Defense. Ms. Wessels also argues that she was entrapped into making the deliveries in counts I and III (the October 25 and November 7 incidents) because she was involved in a sexual relationship with Mr. Moloney at the time. This theory is

contrary to her theory at trial in which she alleged that she was entrapped by threats from Mr. Moloney.

The basic problem with raising this argument, however, is that it is directed to the wrong court. The function of the appellate courts is to review the action of the trial courts. Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier of fact. Instead, it must defer to the factual findings made by the trier of fact. *See, e.g., Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 572, 575, 343 P.2d 183 (1959).

It is one thing for an appellate court to review, as we did in the previous issue, whether sufficient evidence supports a trial court's factual determination. That is, in essence, a legal determination based upon factual findings made by the trial court. In contrast, where a trial court finds that evidence is insufficient to persuade it that something occurred, an appellate court is simply not permitted to reweigh the evidence and come to a contrary finding. It invades the province of the trial court for an appellate court to find compelling that which the trial court found unpersuasive.

That is the situation here. The trial court found both that (1) Ms. Wessels and her witnesses were not credible and (2) that the facts did not arise to the level of entrapment. In other words, the trial court found that Ms. Wessels' motivation was other than what

she said it was. We cannot countermand that factual determination.

Even if Ms. Wessels could change her theory of entrapment on appeal, an issue we do not decide, it would not matter. This court lacks authority to reweigh the evidence concerning why she acted as she did.

Ineffective Assistance. In her statement of additional grounds, Ms. Wessels argues that her counsel provided ineffective assistance in failing to object to testimony from Mr. Moloney that Ms. Wessels had traveled with him to Walla Walla on November 8, 2007.

The standards of review of a claim of ineffective assistance of counsel are well understood. The Sixth Amendment guarantees the right to counsel. More than the mere presence of an attorney is required. The attorney must perform to the standards of the profession. Counsel's failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). To prevail on a claim of ineffective assistance, the defendant must show both that his counsel erred and that the error was so significant, in light of the entire trial record, that it deprived him of a fair trial. *Id.* at 690-692.

We do not understand how this evidence was prejudicial, particularly in light of the fact that she testified to the same fact that Mr. Moloney had testified to—that the two of them drove to Walla Walla on November 8. More importantly, the decision whether or not to object is a classic strategic decision. We are not in a position to find that counsel erred. *Strickland, supra*. Accordingly, Ms. Wessels has not established that her trial attorney performed ineffectively.

Count IV, involving a minor in a drug transaction, is reversed. The remaining convictions are affirmed and the case is remanded for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Kulik, A.C.J.

Brown, J.